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In the Supreme Court of the United States

OCTOBER TERM, 1939

H. J. HEINZ COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

1. The decision below is in direct conflict with the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Inland Steel Company* v. *National Labor Relations Board*, 109 F. (2d) 9; *Fort Wayne Corrugated Paper Co.* v. *National Labor Relations Board*, decided March 28, 1940; and *The M. H. Ritzwoller Company* v. *National Labor Relations Board*, decided May 8, 1940, on the question whether the refusal of an employer to embody an understanding reached with a labor organization in a signed written contract if requested so to do by the labor organization constitutes a refusal to bargain collectively within the meaning of Section 8 (5) of the National Labor

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Relations Act.[1] The court below held that petitioner's refusal to sign a contract, after an agreement had been reached, constituted a refusal to bargain, while the Circuit Court of Appeals for the Seventh Circuit held in the decisions cited that an employer may, consistently with the Act, refuse to enter into any written contract, even though an agreement has been reached.[2]

Petitioner contends (Pet. 17–20) that the decision below is probably also in conflict upon this point with *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45. There this Court, in a general discussion of the Act, stated that "The Act does not compel agreements between employers and employees." But the court below did not hold that the Act compelled the reaching of any agreement; it merely held that if the employer and his employees do reach an agreement the duty to bargain collectively imposed by Section 8 (5) of the Act encompasses

[1] The Seventh Circuit nevertheless enforced the Board's order in the *Fort Wayne* case, upon the ground that the requirement that the employer reduce understandings reached to a written agreement was, under the facts of that case, a form of affirmative relief appropriate to remedy the refusal to bargain.

[2] In accord with the decision below, and in conflict with the decisions of the Seventh Circuit, are *Art Metals Construction Co.* v. *National Labor Relations Board*, 110 F. (2d) 148 (C. C. A. 2d); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632 (C. C. A. 4th); *National Labor Relations Board* v. *Sunshine Mining Company*, 110 F. (2d) 780 (C. C. A. 9th).

the duty to embody their understanding in a signed written contract.

However, because of the conflict among the circuit courts of appeals, and because of the importance of the question, the Board does not oppose the granting of the writ on this issue.

2. Petitioner asserts (Pet. 13–17, 19–20) that the decision below, in holding petitioner responsible for anti-union activities of certain supervisory employees, is in conflict with *Ballston-Stillwater Knitting Co., Inc.* v. *National Labor Relations Board*, 98 F. (2d) 758 (C. C. A. 2d) and with *Cupples Co., Mfrs.* v. *National Labor Relations Board*, 106 F. (2d) 100 (C. C. A. 8th), and that it is probably in conflict with *National Labor Relations Board* v. *Sands Manufacturing Company*, 306 U. S. 332.

There is no conflict with the *Ballston-Stillwater* case. The court below held petitioner responsible for the acts of those supervisory employees whom the employees were justified in believing were acting as petitioner's representatives (R. 1147). The Second Circuit applied substantially the same test in the *Ballston-Stillwater* case. There, however, the employees in question performed such "menial tasks" as washing windows, sweeping, and emptying waste, in addition to doing mechanical work in fixing the machines. Therefore the Second Circuit did not consider it decisive that the employees "supervised in the sense that they

handed out work, inspected, and gave checks to the other employees indicating the amount of work done," and it concluded that their "status was but slightly higher than that of the other employees" (98 F. (2d), at 762). In *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 67, affirmed, as modified, March 11, 1940 (No. 664, this Term), decided subsequent to the *Ballston-Stillwater* case, the Second Circuit held the employer responsible for the acts of minor supervisory employees upon the same theory that was applied by the court below here.

There is no clear conflict with the decision of the Eighth Circuit in the *Cupples* case. The substance of that decision appears to be that, absent proof of actual authority in respect of labor relations, the test is whether, upon all the evidence, the employee in question could reasonably be regarded as having "apparent authority." The Board found that the employee there in question could reasonably be so regarded; the court, being of the opinion that there was insufficient supporting proof, set aside the Board's finding in that respect (106 F. (2d) at 114–116).

The *Sands* case plainly is not in conflict with the decision below. Indeed, the *Sands* case has nothing whatever to do with an employer's responsibility for anti-union activities engaged in by supervisors. The question dealt with in the portion of the *Sands* opinion referred to by petitioner

(Pet. 20) was whether certain high officials of the company, who locked out a group of employees in August, did so because those workers belonged to a union. This Court held that certain anti-union remarks made in June by supervisors who were not in a policymaking position could not be used to prove a company policy accounting for the subsequent lockout by the company executives.

The general question of the responsibility of employers for the activities of supervisory employees is, however, of frequent occurrence, and is of substantial importance in the administration of the Act. Accordingly, the Board does not oppose review of this question.

For the reasons stated, the Government does not oppose the granting of the writ.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

CHARLES FAHY,
General Counsel,
National Labor Relations Board.

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